STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1973

Mary Nicholson, as trustee of the Mary J. Nicholson
Revocable Trust dated September 22, 2006,
Appellant,

vs.

Earl Fischer, et al.,
Respondents.

Filed July 13, 2020
Affirmed
Segal, Chief Judge

Dakota County District Court
File No. 19HA-CV-17-3324

Robert J. Bruno, Robert J. Bruno, Ltd., Burnsville, Minnesota (for appellant)

Paul Edward David Darsow, Darsow Law Office, PLLC, Minneapolis, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

SEGAL, Chief Judge

Appellant received a verdict in her favor on the merits of her suit, but challenges the district court's denial of her posttrial motion. Claiming that respondents intentionally misrepresented the law to the district court and asserted frivolous or otherwise unwarranted

defenses, appellant moved the district court for treble damages under Minn. Stat. §§ 481.07-.071 (2018) and an award of attorney fees as a sanction under Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2018). Appellant argues that the district court abused its discretion in denying the motion. We affirm.

FACTS

In January 2015, appellant Mary Nicholson commenced a lawsuit against Samantha Lubbesmeyer based on Lubbesmeyer's failure to make payments owed to Nicholson under two promissory notes. The parties agreed to mediate, and respondent Earl Fischer attended the mediation session with Lubbesmeyer. The mediation resulted in a settlement agreement. The settlement agreement established the terms under which Lubbesmeyer would make payments to Nicholson and also contained the following provision:

> 5. Payment under paragraph 1 and the Deficiency in paragraph 4 is guaranteed by third party Earl Fischer ("Fischer"), by separate written Guaranty of even date herewith ("Fischer Guaranty"), which is to be secured by an irrevocable bank Letter of Credit within 5 days hereof in the amount of $50,000.00, payable on sight ("SLC"), or $50,000.00 cashier's check delivered to Nicholson's attorney. The liability of Fischer shall not exceed the sum of $50,000.00.

Fischer signed the settlement agreement as well as a separate guaranty even though he was not a party to the dispute. The guaranty provided:

> The undersigned, in consideration of the written Settlement Agreement in court File No. 19HA-CV-15-300, of even date herewith, at the request of the undersigned and on the faith of this Guaranty, hereby absolutely, unconditionally and irrevocably guarantees to Mary Nicholson ("Nicholson") the full and complete performance of all the covenants and obligations of Samantha Lubbesmeyer ("Lubbesmeyer") under said Settlement Agreement, including any extension or

> renewal thereof, and the full payment by Lubbesmeyer of all payments and all other charges and amounts required to be paid under the Settlement Agreement . . . or incurred in enforcing this Guaranty. The obligation of the Guaranty shall not exceed the sum of $50,000.00.

Lubbesmeyer defaulted on the payments. Nicholson subsequently sought and was granted sale of Lubbesmeyer's real property to satisfy a portion of the debt. Nicholson also filed a motion to enter judgment against Fischer for $50,000 based on the guaranty. The district court denied the motion because Fischer was not a party to the underlying action.

Nicholson next commenced this action against Fischer, seeking to enforce the $50,000 guaranty. Fischer retained respondents Michael Lowden, Shari Lowden and the Lowden Law Firm LLC (collectively Lowden) to represent him. As counsel for Fischer, Lowden filed a motion to dismiss, arguing that the mediated settlement agreement was not binding on Fischer because it did not contain the notices required by Minn. Stat. § 572.35, subd. 1 (2018),[1] and that Lubbesmeyer fraudulently induced Fischer into signing the

[1] Minn. Stat. § 572.35, subd. 1, provides that a mediated settlement agreement is not binding unless:

> (1) it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or
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> (2) the parties were otherwise advised of the conditions in clause (1).

guaranty, rendering it unconscionable and unenforceable.[2] Nicholson moved for summary judgment, arguing that the guaranty was a separate contract from the settlement agreement and was "absolute, unconditional, and irrevocable."

The district court denied the motions of both parties. The court observed that "[t]he resolution of this case turn[s] on the enforceability of the Guaranty. [Fischer] argues that the Guaranty is part and parcel of an unenforceable [mediated] settlement agreement pursuant to Section 572.35, subdivision 1. [Nicholson] argues the Guaranty is valid and is not a mediated settlement agreement." The district court determined that there was a genuine issue of material fact concerning enforceability of the guaranty because "[w]hile it is undisputed that the Settlement Agreement and attached Guaranty do not contain the provision required by Section 572.35, subdivision 1, there is a genuine dispute as to whether this agreement is a mediated settlement agreement which resulted from mediation." The parties later cross-moved for summary judgment, but the district court again denied the motions because there were genuine issues of material fact regarding the "facts and circumstances surrounding the mediation."

The case was tried to the district court. The parties agreed that the issue for the court trial was "whether or not the guaranty that was signed was or wasn't an agreement arising out of a mediated settlement process and therefore subject to Minnesota's ADR

[2] Fischer alleged that Lubbesmeyer offered to assign Fischer $1.6 million in accounts receivable from her business in exchange for Fischer forgiving the debts she owed him and signing the guaranty for the settlement agreement with Nicholson. Fischer further alleged that he accepted her offer, released Lubbesmeyer's obligations to him and signed the guaranty, but later learned that the $1.6 million in accounts receivable did not exist and never recovered any of the money.

statute." The parties stipulated that the settlement agreement between Nicholson and Lubbesmeyer was a mediated settlement agreement, that Fischer was present at the mediation session, and that the settlement agreement required Fischer to sign a guaranty.

In its findings of fact, conclusions of law, and order for judgment, the district court determined that the guaranty was a separate agreement from the settlement agreement and that the guaranty "is enforceable because [Fischer] was not a party to the mediation and therefore did not need notice for the Guaranty to be enforceable." Accordingly, the district court determined that Fischer was obligated to pay Nicholson the $50,000 sum provided in the guaranty. Fischer paid the $50,000 to Nicholson and does not appeal the district court's determination that the guaranty was enforceable.

Nicholson filed a posttrial motion seeking treble damages pursuant to Minn. Stat. §§ 481.07-.071 alleging that Lowden intended "to deceive the Court by misrepresenting the law." She also requested sanctions against Lowden for violating Minn. R. Civ. P. 11.02 and Minn. Stat. § 549.211, subd. 2, arguing that Fischer asserted denials and defenses that were allegedly "unwarranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law." The district court denied the motion. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Nicholson's motion for treble damages under Minn. Stat. §§ 481.07-.071.

We review the district court's denial of a motion for treble damages under Minn. Stat. § 481.07-.071 for a clear abuse of discretion. *Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 267-68 (Minn. 1992).

Nicholson argues that the district court abused its discretion by denying her motion for treble damages under Minn. Stat. §§ 481.07-.071. The statutes provide the following:

> An attorney who, with intent to deceive a court or a party to an action or judicial proceeding, is guilty of or consents to any deceit or collusion, shall be guilty of a misdemeanor; and, in addition to the punishment prescribed therefor, the attorney shall be liable to the party injured in treble damages. . . .

Minn. Stat. § 481.07.

> Every attorney or counselor at law who shall be guilty of any deceit or collusion, or shall consent thereto, with intent to deceive the court or any party, or who shall delay the attorney's client's suit with a view to the attorney's own gain, shall be guilty of a misdemeanor and, in addition to the punishment prescribed by law therefor, shall forfeit to the party injured treble damages, to be recovered in a civil action.

Minn. Stat. § 481.071. Accordingly, the statutes generally authorize an award of treble damages when an attorney engages in "deceit or collusion . . . , with intent to deceive." *Id.* When interpreting a statute, we may look to the dictionary definitions of the statutory language. *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011). "Intent" is commonly defined as "something that is intended; an aim or purpose." *The American Heritage Dictionary of the English Language* 912 (5th ed. 2011).

After considering Nicholson's argument, the district court judge denied the motion for treble damages because he was "not convinced that [Lowden] deceived or intended to deceive this court." Nicholson argues that this determination was an abuse of discretion because Lowden misled the court by quoting only clause 1 of Minn. Stat. § 572.35, subd. 1, and by citing *Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d 927 (Minn. 1998), a case which Nicholson claims was rendered moot by a statutory amendment. Specifically, Nicholson points to a section of Lowden's memorandum of law submitted in support of Fischer's motion to dismiss that provides as follows:

> The law in Minnesota is clear and unambiguous that mediated settlement agreements are not binding on a party unless:
>
> (1) It contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights; or
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> See Minn. Stat. § 572.35 (1). See also Haghighi v. Russian-American Broadcasting Co., 577 N.W.2d 927 (Minn. 1998).

Lowden failed to include clause (2) of Minn. Stat. § 572.35, subd. 1, in the brief. Clause (2) provides that the disclosure/notice requirements of clause (1) are satisfied if "the parties were otherwise advised of the conditions in clause (1)." Minn. Stat. § 572.35, subd. 1(2).

The *Haghighi* case was decided a year before clause (2) was added to Minn. Stat. § 572.35, subd. 1. 1999 Minn. Laws ch. 190, § 1, at 1040. In *Haghighi*, the Minnesota

Supreme Court held that, under a "plain language reading" of the version of Minn. Stat. § 572.35, subd. 1, in effect at the time, a mediated settlement agreement is not enforceable unless it contains an express statement that it is binding. 577 N.W.2d at 929. Although we are not persuaded that *Haghighi* is "moot," after the 1999 amendment, *Haghighi* is no longer good law for the proposition that the disclosures required by clause (1) must be made in the settlement agreement itself.

Nicholson argues that, under these facts, "the only natural conclusion" is that Lowden had an "intent to deceive the court" and that the district court's determination to the contrary was an abuse of discretion. Nicholson contends that Fischer was "otherwise advised" of the clause (1) conditions and that Lowden thus was trying to mislead the court by focusing just on the fact that the mediated settlement agreement did not contain the express provisions set out in clause (1). We disagree.

We note first that Nicholson's argument fails to take into account the fact that Lowden consistently argued both that the mediated settlement agreement failed to contain the clause (1) provisions *and* that Fischer was not "otherwise advised" of those provisions. Lowden thereby maintained arguments under both clauses. For example, the memorandum of law submitted in support of Fischer's motion to dismiss quotes extensively from Fischer's affidavit, in which he alleges: that he "was never informed of his right to have counsel or that a mediated settlement agreement would be binding on him"; that "[a]t no time did counsel for [Nicholson or Lubbesmeyer] inform [him] that they did not represent his interests in the mediated settlement agreement"; and that he "was not advised of his right to have counsel present and did not receive a copy of the agreement." Thus, Fischer's

defense throughout the proceedings was both that the settlement agreement did not contain the required provisions and he did not otherwise receive notice of the provisions. And it is significant that Lowden did clarify in a later filing in the district court that the statute had been amended to allow the parties to be "otherwise advised" of the conditions in clause (1).[3]

Based on this record, we conclude that the district court did not abuse its discretion in denying Nicholson's motion for treble damages under Minn. Stat. §481.071.[4]

II. The district court did not abuse its discretion by denying Nicholson's motion for sanctions under Minn. Stat. § 549.211, subd. 3, and Minn. R. Civ. P. 11.03.

An attorney presenting pleadings or filings to the district court "certifies that the claims are not being presented for an improper purpose, such as harassment; that they are supported by existing law or a nonfrivolous argument to change the law; and that factual allegations or their denials have evidentiary support." *Collins v. Waconia Dodge, Inc.*, 793 N.W.2d 142, 145 (Minn. App. 2011), *review denied* (Minn. Mar. 15, 2011). These requirements arise under both Minn. Stat. § 549.211, subd. 2, and Minn. R. Civ. P. 11.02, and a district court may sanction an attorney for violating the requirements. Minn. Stat.

[3] Further, there is no indication that the district court actually relied on or was misled by Lowden's briefing when the district court denied Nicholson's first motion for summary judgment. The district court's order denying Nicholson's motion, which was issued at the same time as its order denying Fischer's motion that contains the complained-of content, quotes Minn. Stat. § 572.35, subd. 1, in its entirety, including both clauses (1) and (2).

[4] It bears noting that the sole issue presented here is limited to whether the district court abused its discretion in concluding that Lowden lacked an "intent to deceive" under Minn. Stat. § 481.071. Nothing in this decision should be interpreted as condoning or otherwise expressing an opinion on the propriety of omitting clause (2) of Minn. Stat. § 572.35, subd. 1, or of citing *Haghighi* in the brief.

§ 549.211, subd. 3; Minn. R. Civ. P. 11.03. We review the district court's decision on sanctions for an abuse of discretion. *Collins*, 793 N.W.2d at 145.

Following the district court's determination that the guaranty was enforceable, Nicholson filed a posttrial motion requesting an award of sanctions under Minn. Stat. § 549.211, subd. 3, and Minn. R. Civ. P. 11.03. The motion listed every denial and defense raised by Lowden on behalf of Fischer while defending the lawsuit and generally alleged that they were "unwarranted by existing law or by a nonfrivolous argument." The district court denied Nicholson's motion for sanctions based on the determination that "counsel had an objectively reasonable challenge to the enforceability of the Guaranty in this case." The district court further explained that the "facts surrounding the mediation and mediated settlement agreement in the earlier case where [Fisher] was not a party created a reason[] the Court does not find [Fisher's] arguments frivolous."

Nicholson argues that the district court abused its discretion by denying the motion for sanctions. She does not specify how the district court's determination constitutes an abuse of discretion. She again generally challenges every defense raised and argues that each is meritless. But sanctions are not appropriate simply because a party does not prevail on the merits. *Radloff v. First Am. Nat'l Bank of St. Cloud, N.A.*, 470 N.W.2d 154, 157 (Minn. App. 1991), *review denied* (Minn. July 24, 1991). Rather, one of the primary purposes of sanctions is to deter litigation abuse. *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990).

Here, the district court determined that sanctions were not warranted because the facts and circumstances surrounding the mediation, settlement agreement, and guaranty

provided Lowden with an objectively reasonable and nonfrivolous basis to challenge the enforceability of the guaranty. The record supports this determination. Fischer had a unique position in that he was not a party to the earlier lawsuit between Nicholson and Lubbesmeyer but attended the mediation, signed the settlement agreement, and guaranteed the amount owed under the settlement agreement on behalf of Lubbesmeyer. And as the district court observed when denying Nicholson's second motion for summary judgment, the "facts and circumstances surrounding the mediation are certainly in dispute."

We agree with the district court that these complex and disputed facts provided Lowden with an objectively reasonable and nonfrivolous basis to challenge the enforceability of the guaranty. The fact that the district court ultimately determined that the guaranty was enforceable does not render the conduct sanctionable. *Radloff*, 470 N.W.2d at 157. The district court therefore did not abuse its discretion in denying Nicholson's motion for sanctions under Minn. Stat. § 549.211, subd. 3, and Minn. R. Civ. P. 11.03.

Affirmed.